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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**ABANTE ROOTER AND PLUMBING, INC., ET AL.,**

Plaintiffs,

vs.

**ALARM.COM INCORPORATED, ET AL.,**

Defendants.

CASE NO. 15-cv-06314-YGR

**ORDER GRANTING PLAINTIFFS' MOTION TO AMEND CLASS DEFINITIONS**

Dkt. No. 164

On May 5, 2017, this Court granted plaintiffs' motion for class certification as modified by the Court, (Dkt. No. 126), and certified three classes, namely:

**Cell Phone Class:** All persons in the United States to whom: (a) Alliance or its agents, on Defendants' behalf, instituted one or more non-emergency telephone calls; (b) promoting Defendants' goods or services; (c) to a recipient's cellular telephone number; (d) through the use of an automatic telephone dialing system or an artificial or prerecorded voice; (e) at any time since October 15, 2013; (f) except those persons that provided Defendants with their telephone number(s) prior to receiving call(s) from Alliance or its agents, on Defendants' behalf.

**Residential Class:** All persons in the United States to whom: (a) Alliance or its agents, on Defendants' behalf, initiated one or more non-emergency telephone calls; (b) promoting Defendants' goods or services; (c) to a recipient's residential telephone line number; (d) through the use of an artificial or prerecorded voice; (e) at any time since October 15, 2013; (f) except those persons that provided Defendants with their telephone number(s) prior to receiving call(s) from Alliance or its agents, on Defendants' behalf.

**National Do-Not-Call Class ("DNC Class"):** All persons in the United States who: (a) received more than one call, made by Alliance on Defendants' behalf; (b) promoting Defendants' goods or services; (c) in a twelve-month period; (d) on their a cellular telephone line number or residential telephone line (e) whose cellular or residential telephone line number(s) appear on the National Do-Not-Call Registry; (f) at any time since June 30, 2010; (g) except those persons that provided Defendants with their telephone number(s) prior to receiving call(s) from Alliance or its agents, on Defendants' behalf.

1       On September 14, 2017, this Court denied plaintiffs' motion to amend these class  
2 definitions by excluding individuals covered by calling data which plaintiffs were unable to obtain  
3 from Alliance due to ongoing bankruptcy proceedings (the "Additional Calling Data"). (Dkt. No.  
4 150.) The Court noted that plaintiffs had made no showing that "the individuals included in the  
5 Additional Calling Data have TCPA claims against defendants which differ in any way from those  
6 of other class members." (*Id.*) Further, the Court found that plaintiffs' proposed amendments  
7 would "improperly and arbitrarily exclude individuals whose TCPA claims against defendants are  
8 substantially similar to those of other class members" and "deprive defendants of the benefit of a  
9 'fair and efficient adjudication of the controversy.'" (*Id.* (quoting Fed. R. Civ. P. 23(b)(3))).)  
10 Finally, the Court noted that "plaintiffs [had] not shown that the Additional Calling Data can never  
11 be obtained, or that they have exercised due diligence, but nevertheless failed, to obtain the data."  
12 (*Id.*)

13       Now before the Court is plaintiffs' motion to amend the class definitions in this case as  
14 follows:<sup>1</sup>

15       **Cell Phone Class:** All persons in the United States, to whom: (a) Alliance's ~~or its~~  
16 agents **Nationwide Alarms, LLC**, on Defendants' behalf, instituted one or more  
17 non-emergency telephone calls; (b) promoting Defendants' goods or services; (c)  
18 to a recipient's cellular telephone number; (d) through the use of an automatic  
19 telephone dialing system or an artificial or prerecorded voice; (e) at any time  
since October 15, 2013; (f) except those persons that provided Defendants with  
their telephone number(s) prior to receiving call(s) from ~~Alliance or its agents~~  
~~Nationwide~~, on Defendants' behalf.

20       **Residential Class:** All persons in the United States to whom: (a) Alliance ~~or its~~  
21 agents, ~~on Defendants' behalf~~, initiated one or more non emergency telephone  
22 calls; (b) promoting Defendants' goods or services; (c) to a recipient's residential  
23 telephone line number; (d) through the use of an artificial or prerecorded voice;  
24 (e) at any time since October 15, 2013; (f) except those persons that provided  
Defendants with their telephone number(s) prior to receiving call(s) from ~~Alliance~~  
~~or its agents~~, on Defendants' behalf.<sup>2</sup>

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27       <sup>1</sup> Strikethrough text indicates proposed deletions and bolded text indicates proposed  
insertions.

28       <sup>2</sup> Plaintiffs seek to decertify the Residential Class which is not opposed.

1                   **National Do-Not-Call Class (“DNC Class”):** All persons in the United States  
2 who: (a) received more than one call, made by Alliance on Defendants’ behalf;  
3 (b) promoting Defendants’ goods or services; (c) in a twelve-month period; (d) on  
their cellular telephone line or residential line; (e) whose cellular or residential  
4 telephone line number(s) appear on the National Do-Not-Call Registry; (f) at any  
time since ~~June 30, 2010~~ December 30, 2011; (g) except those persons that  
provided Defendants with their telephone number(s) prior to receiving call(s)  
5 from Alliance or its agents, on Defendants’ behalf.<sup>3</sup>

6                   (Dkt. No. 164.)

7                   Having carefully considered the pleadings and arguments of the parties, and for the reasons  
set forth below, the Court hereby **GRANTS** plaintiffs’ motion.

8                   **I.        LEGAL STANDARD**

9                   Fed. R. Civ. Pro. 23(c)(1)(C) permits a court to “alter[] or amend[]” an order granting class  
10 certification “before final judgment.” The Ninth Circuit has similarly stated that district courts  
11 may modify a class definition as a result of developments during the course of litigation. *See*  
12 *Armstrong v. Davis*, 275 F.3d 849, 871 fn. 28 (9th Cir. 2001) (recognizing that Rule 23 “provides  
13 district courts with broad discretion to determine whether a class should be certified, and to revisit  
14 that certification” and that “the district court may redefine the class”) (citing *Penk v. Oregon State  
Bd. of Higher Educ.*, 816 F.2d 458, 467 (9th Cir.1987)).

15                   District courts have a responsibility to review continually “the appropriateness of a  
certified class in light of developments subsequent to class certification.” *Schilling v. TransCor  
Am., LLC*, 2012 WL 4859020, at \*1 (N.D. Cal. 2012); *see also Richardson v. Byrd*, 709 F.2d  
16 1016, 1019 (5th Cir. 1983) (“Under Rule 23 the district court is charged with the duty of  
monitoring its class decisions in light of the evidentiary development of the case. The district  
judge must define, redefine, subclass, and decertify as appropriate in response to the progression  
of the case from assertion to facts.”)

17                   **II.      DISCUSSION**

18                   **A.      Recent Discovery Developments**

19                   Following this Court’s order denying plaintiffs’ motion to amend the class definitions in  
this case, plaintiffs undertook sufficient efforts to determine whether plaintiffs could obtain the

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28                   <sup>3</sup> The noted modification is not opposed.

1 Additional Calling Data and identify additional class members. First, plaintiffs filed a motion to  
2 lift the stay in Alliance’s bankruptcy proceeding to allow plaintiffs to (i) use the Additional  
3 Calling Data which Alliance produced in the *Monitronics* MDL in this case and (ii) take  
4 depositions of Alliance and its officers. On November 13, 2017, Alliance agreed to allow  
5 plaintiffs to use the data produced in the *Monitronics* MDL in this case. On November 15, 2017,  
6 the bankruptcy court granted plaintiffs’ motion to lift the stay and to permit depositions of  
7 Alliance and its officers. (Dkt. No. 164, Declaration of Beth Terrell (“Terrell Decl.”) ¶ 5.)  
8 Second, plaintiffs provided the Additional Calling Data to their expert to analyze and identify  
9 additional class members. (*Id.*, ¶ 6.) Third, plaintiffs confirmed through the Rule 30(b)(6)  
10 deposition of Alliance that Alliance had fully responded to plaintiffs’ subpoena and that the  
11 Additional Calling Data was comprehensive and up-to-date. (*Id.* Ex. B, Deposition of Matthew  
12 Pitts (“Pitts Dep.”) at 40:3- 44:23; 93:4-95:5.) Fourth, plaintiffs attempted to conduct additional  
13 discovery by issuing subpoenas to all 38 of Alliance’s small “subdealers” which requested calling  
14 data for telemarketing calls on behalf of Alliance since January 30, 2011, as well as related  
15 documents including scripts and correspondence. (Terrell Decl., ¶ 7.) Plaintiffs received no  
16 calling records in response to any of the 38 subdealer subpoenas. (*Id.*)

17 **B. Analysis**

18 **1. Cell Phone Class**

19 Plaintiffs have now obtained all call records from Alliance and its agent, namely  
20 Nationwide, and Nationwide’s calling platform (the “Ytel System”). This Additional Calling Data  
21 indicates that some individuals who fall within the Cell Phone Class cannot be identified because  
22 these individuals may have received a call from a subdealer which failed to preserve calling data.  
23 Plaintiffs attempted to identify such individuals by issuing subpoenas to all 38 of Alliance’s  
24 subdealers. However, plaintiffs received no additional call data in response to these subpoenas.

25 The Court finds the individuals who received calls from Alliance or Nationwide have  
26 TCPA claims against defendants which differ from those of individuals who received a call from a  
27 subdealer. Specifically, individuals who were called by Alliance or Nationwide can establish that  
28 defendants called their phone numbers by using the calling data which Alliance and Nationwide

1 have produced in this litigation. By contrast, individuals who were called by subdealers which did  
2 not retain calling data lack a common methodology for establishing that defendants called their  
3 cell phone numbers.

4 Accordingly, a Cell Phone Class which includes both individuals who were called by  
5 Alliance or Nationwide, and those who were called by another subdealer which failed to preserve  
6 calling data, is not “sufficiently cohesive” under the “predominance inquiry” to warrant classwide  
7 adjudication. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)).<sup>4</sup> Therefore, the  
8 Court **GRANTS** plaintiffs’ motion to narrow the Cell Phone Class definition to exclude individuals  
9 who were not called by “Alliance’s agent Nationwide.”

10 **2. Residential Class**

11 To prove the TCPA claim asserted by the Residential Class, plaintiffs must establish that  
12 (i) an artificial or prerecorded voice (ii) was used to place calls (iii) to a residential telephone  
13 number (iv) without prior express consent. 47 U.S.C. § 227(b)(1)(B). Joseph Moretti, the owner  
14 of Nationwide, recently testified that Nationwide used the Ytel system to call leads from a variety  
15 of sources, some of which involved live agents. (Terrell Decl., Ex. C, Deposition of Joseph  
16 Moretti at 20:19-.21:1; 50:12-52:6; Ex. D, Deposition of Justin Ramsey at 101:20-104:7.)  
17 Therefore, the Court finds that some of the individuals associated with residential telephone  
18 numbers included in the Ytel records likely did not receive a call using an artificial or prerecorded  
19 voice. All such individuals thus lack valid TCPA claims. See 47 U.S.C. § 227(b)(1)(B). Neither  
20 party has proffered a classwide mechanism to determine whether Residential Class members  
21 received a call involving an artificial or prerecorded voice or a live agent. Defendant does not  
22 oppose plaintiffs’ motion to decertify the Residential Class. (Response at 2.)

23 Accordingly, plaintiffs’ motion to decertify the Residential Class is **GRANTED** on the  
24 ground of non-opposition that the Residential Class as defined lacks commonality and

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26 <sup>4</sup> Defendants argue that plaintiffs fail to “assert that any of the arguments” which plaintiffs  
27 proffered in support of plaintiffs’ motion to certify the Cell Phone class “have changed.” (Dkt.  
28 No. 171, Defendants’ Response (“Response”) at 2.) Defendants do not persuade, as they ignore  
the fact that plaintiffs have now sought and obtained the Additional Calling Data from Alliance  
which indicates that the Cell Phone Class as defined includes individuals called by vendors other  
than Alliance whose TCPA claims differ from those individuals who received calls from Alliance  
or Nationwide.

1 predominance. *See United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir.  
2 2010) (“[A] district court retains the flexibility to address problems with a certified class as they  
3 arise, including the ability to decertify.”).

4           **3. DNC Class**

5 Plaintiffs previously moved for certification of a DNC Class with a class period which  
6 commences on December 30, 2011. (Dkt. No. 85 at 12-13.) This class period reflects the four-  
7 year statute of limitations for TCPA claims. However, due to clerical error, the Court certified a  
8 DNC Class commencing on June 30, 2010. (Dkt. No. 126 at 17:1-7.) Plaintiffs now move to  
9 correct that clerical error. In light of defendant’s lack of opposition, the Court **GRANTS** plaintiffs  
10 request to modify the class period with regard to the DNC Class. (Response at 2.)

11           **III. CONCLUSION**

12 For the reasons discussed above, plaintiffs’ motion to amend class definitions is **GRANTED**.  
13 The Residential Class is hereby **DECERTIFIED** and the remaining class definitions are amended as  
14 follows:

15           **Cell Phone Class:** All persons in the United States, to whom: (a) Alliance’s or its  
16 agents **Nationwide Alarms, LLC**, on Defendants’ behalf, instituted one or more  
17 non-emergency telephone calls; (b) promoting Defendants’ goods or services; (c)  
18 to a recipient’s cellular telephone number; (d) through the use of an automatic  
19 telephone dialing system or an artificial or prerecorded voice; (e) at any time  
since October 15, 2013; (f) except those persons that provided Defendants with  
their telephone number(s) prior to receiving call(s) from **Alliance or its agents**  
**Nationwide**, on Defendants’ behalf.

20           **National Do-Not-Call Class (“DNC Class”):** All persons in the United States  
21 who: (a) received more than one call, made by Alliance on Defendants’ behalf;  
22 (b) promoting Defendants’ goods or services; (c) in a twelve-month period; (d) on  
23 their cellular telephone line or residential line; (e) whose cellular or residential  
24 telephone line number(s) appear on the National Do-Not-Call Registry; (f) at any  
time since **June 30, 2010 December 30, 2011**; (g) except those persons that  
provided Defendants with their telephone number(s) prior to receiving call(s)  
from Alliance or its agents, on Defendants’ behalf.

25 This terminates Dkt. No. 164.

26           **IT IS SO ORDERED.**

27 Dated: January 25, 2018

  
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YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE